

**Law Kok Leong & Anor v Nor Hapiza bt Abu Hassan (wife of
the deceased, Abdul Manap bin Hamid)**

HIGH COURT (TAIPING) — CIVIL APPEAL NO 12BNCVC-7-4 OF
2016
MOHAMED ZAINI MAZLAN JC
19 DECEMBER 2016

Tort — Road accident — Appeal against liability and quantum — Trial court held respondent 10% liable and appellants 90% liable — Whether trial judge erred in relying on hearsay evidence of witnesses who had not witnessed the accident — Whether trial judge acted on wrong principle of law or fact, or grossly overestimated or underestimated amount awarded

The present appeal arose out of a collision between motorcycles rode by one Abdul Manap bin Hamid, deceased ('the respondent') and one Nasir bin Mohamad Yusop, deceased ('the second appellant') at around 7am on 5 July 2013. The second appellant died on the spot whereas the respondent passed away about two years after the accident. Based on the evidence of the investigating officer ('SP1'), the respondent's wife ('SP2') and the sketch plan, the learned sessions court judge ('the SCJ') held the respondent 10% liable and the appellants 90% liable. The appellants had appealed against the decision of the SCJ on the issue of liability and quantum. On the issue of liability, the appellants submitted that the learned SCJ fell into error when he relied on the hearsay evidence of SP1 and SP2, as neither one of them had witnessed the accident. With regards to quantum, the appellants submitted that: (a) for traumatic brain injury, the award of RM300,000 was excessive as the maximum award set out in the Revised Compendium of Personal Injury Awards ('the Compendium') was RM220,000 ('first submission'); (b) 'closed mid-shaft fracture right femur' and 'closed right tibia plateau fracture' should not have been awarded separately and should be counted as one ('second submission'); (c) global award should have been awarded and not distinctly for 'closed fracture mid-shaft right radius and ulna' and 'open comminute fracture distal end right radius and ulna' ('third submission'); (d) the learned SCJ should have reduced the general award by more than 35% considering the fact that the respondent had passed away 19 months after the accident ('fourth submission'); (e) the awards of loss of dependency should be reduced to RM93,600 from RM100,800 as awarded by the learned SCJ ('fifth submission'); and (f) in awarding RM19,000 for nursing care, the learned SCJ erred when he took into consideration the costs of buying diapers, milk and medicine as these items had already been awarded separately ('sixth submission').

A **Held**, dismissing the appeal with costs of RM3,000:

- (1) The learned SCJ correctly concluded the direction of travel of at least the respondent. Although SP1's conclusion was premised on the statement by SP2, the circumstances supported the fact that the respondent travelled from the top to the bottom in the sketch plan. The accident occurred at around 7am. It was not disputed that the respondent was travelling to work. It was also not disputed that the respondent lived in IPD Kerian and worked in IPD Tanjung Piandang as the head of the police station there. Given these facts, the direction of travel had to be from the top to the bottom, as that would be the direction from where the respondent lived to where he worked (see para 14).
- (2) The learned SCJ also did not only rely on SP1 and SP2's statements alone, as he had relied on the silent evidence, namely the sketch plan and the photographs. He correctly concluded that it was the second appellant who had encroached into the respondent's lane, as the fragments were scattered in the respondent's lane (see para 15).
- (3) The court was in agreement with the learned SCJ's apportionment of 10% liability on the respondent based on his finding that the respondent was partly negligent in travelling near the middle of the road and not more to the side. In totality, there was no reason for the court to disturb the findings on liability (see paras 17–18).
- (4) The court was disinclined to disturb the award of 'traumatic brain injury' given by the SCJ as the learned SCJ had referred to the awards given in recent cases and was guided by them. He had also correctly pointed out that the Compendium was merely a guideline and that he was not bound to adhere to the amount set out in it. As for the second and third submissions, the court agreed with the SCJ that the award should be separated as the injuries were on separate parts. With regards to the fourth submission, the learned SCJ was very much entitled to exercise his discretion on the percentage to be deducted. On the award of loss of dependency, the difference between the amount awarded and the amount proposed were not significant which suggested that the amount awarded by the learned SCJ was not entirely excessive. As for the award of RM19,000 for nursing care, the court reduced the amount to RM7,600 as it was correct that the learned SCJ had already made a separate award for those items (see para 19).
- (5) It has been well stated in decided cases, that the appellate court should be slow in reversing the amount of damages awarded by the trial judge, unless the trial judge had acted on a wrong principle of law or fact, or had grossly overestimated or underestimated the amount awarded. The court found no evidence of that in the present appeal (see para 20).

[Bahasa Malaysia summary]

Rayuan ini berbangkit daripada pelanggaran antara motosikal yang ditunggang oleh seorang bernama Abdul Manap bin Hamid, si mati ('responden') dan seorang bernama Nasir bin Mohamad Yusop, si mati ('perayu kedua') pada kira-kira 7 pagi pada 5 Julai 2013. Perayu kedua meninggal di tempat kejadian manakala responden meninggal lebih kurang dua tahun selepas kemalangan. Berdasarkan keterangan pegawai penyiasat ('SP1'), isteri responden ('SP2') dan pelan lakaran, hakim mahkamah sesyen yang bijaksana ('HMS') memutuskan responden 10% bertanggung dan perayu 90% bertanggung. Perayu telah merayu terhadap keputusan HMS atas isu tanggung dan kuantum. Pada isu tanggung, perayu mengemukakan bahawa HMS yang bijaksana telah terkhilaf apabila dia bergantung kepada keterangan dengar cakap SP1 dan SP2, memandangkan tiada seorang pun daripada mereka telah menyaksikan kemalangan. Berkaitan dengan kuantum, perayu mengemukakan bahawa: (a) untuk kecederaan trauma otak, award sebanyak RM300,000 adalah melampau kerana award maksimum yang ditetapkan dalam Revised Compendium of Personal Injury Awards (Compendium) adalah RM220,000 ('penghujahan pertama'); (b) 'closed mid-shaft fracture right femur' dan 'closed right tibia plateau fracture' tidak sepatutnya diawardkan berasingan dan sepatutnya dikira sebagai satu ('penghujahan kedua'); (c) award global sepatutnya diawardkan dan bukan secara jelas untuk 'closed fracture mid-shaft right radius and ulna' dan 'open comminute fracture distal end right radius and ulna' ('penghujahan ketiga'); (d) HMS bijaksana sepatutnya telah mengurangkan award am lebih daripada 35% mengambil kira fakta bahawa responden telah meninggal dunia 19 bulan selepas kemalangan ('penghujahan keempat'); (e) award kehilangan pergantungan sepatutnya dikurangkan ke RM93,600 dari RM100,800 seperti yang diawardkan oleh HMS bijaksana ('penghujahan kelima'); dan (f) dalam mengawardkan RM19,000 untuk penjagaan kejururawatan, HMS yang bijaksana terkhilaf apabila dia mengambil kira kos membeli lampin, susu, ubatan kerana perkara ini telah diawardkan secara berasingan ('penghujahan keenam').

Diputuskan, menolak rayuan dengan kos sebanyak RM3,000:

- (1) HMS telah dengan betul menyimpulkan arah perjalanan sekurang-kurangnya untuk responden. Walaupun kesimpulan SP1 adalah berdasarkan kenyataan oleh SP2, keadaan menyokong fakta bahawa responden bergerak dari atas ke bawah dalam pelan lakaran. Kemalangan berlaku lebih kurang pada 7 pagi. Ia tidak dipertikaikan bahawa responden dalam perjalanan ke tempat kerja. Ia juga tidak dipertikaikan responden tinggal di IPD Kerian dan berkerja di IPD Tanjung Piandang sebagai ketua balai polis di sana. Berdasarkan fakta ini, arah perjalanan hendaklah daripada atas ke bawah, kerana ia akan

- A menjadi arah dari mana responden tinggal ke tempat dia bekerja (lihat perenggan 14).
- (2) HMS yang bijaksana juga tidak hanya bergantung kepada kenyataan SP1 dan SP2 semata-mata, kerana beliau bergantung kepada keterangan
- B senyap, iaitu pelan lakaran dan gambar. Beliau dengan betul telah menyimpulkan bahawa ia adalah perayu kedua yang telah masuk ke laluan responden, memandangkan serpihan bertaburan di laluan responden (lihat perenggan 15).
- (3) Mahkamah bersetuju dengan pembahagian sebanyak 10% tanggungan oleh HMS yang bijaksana terhadap responden berdasarkan dapatannya bahawa responden adalah sebahagiannya cuai dalam menunggang di
- C tengah-tengah jalan dan tidak lebih ke sebelah tepi jalan. Secara keseluruhan, tidak terdapat sebab untuk mahkamah mengganggu dapatan terhadap tanggungan (lihat perenggan 17–18).
- (4) Mahkamah enggan mengganggu award ‘traumatic brain injury’ yang diberikan oleh HMS kerana HMS yang bijaksana telah merujuk kepada award yang diberikan dalam kes-kes terkini dan berpandukan kepada kes-kes tersebut. Beliau telah dengan betul menunjukkan bahawa
- E Compendium hanyalah garis panduan dan dia tidak terikat untuk mematuhi jumlah yang ditetapkan di dalamnya. Bagi penghujahan kedua dan ketiga, mahkamah bersetuju dengan HMS bahawa award sepatutnya berasingan kerana kecederaan adalah di bahagian berasingan. Berkaitan dengan penghujahan keempat, HMS yang bijaksana berhak
- F untuk menggunakan budi bicaranya terhadap peratusan yang akan ditolak. Bagi award kehilangan pergantungan, beza antara jumlah yang diawardkan dan jumlah yang disarankan tidak ketara yang mana mencadangkan jumlah yang diawardkan oleh HMS yang bijaksana tidaklah terlalu berlebihan. Untuk award penjagaan kejururawatan
- G sebanyak RM19,000, mahkamah mengurangkan jumlah kepada RM7,600 kerana ia adalah betul bahawa HMS yang bijaksana telah pun membuat award berasingan untuk perkara tersebut (lihat perenggan 19).
- (5) Ia telah ditetapkan sebaiknya dalam kes yang telah diputuskan, bahawa mahkamah rayuan sepatutnya tidak cepat dalam mengakas jumlah ganti rugi yang diawardkan oleh hakim perbicaraan, kecuali hakim perbicaraan telah bertindak atas prinsip atau fakta undang-undang yang salah, atau telah melebihi atau meremehkan jumlah yang diawardkan. Mahkamah mendapati tiada keterangan terhadap perkara itu dalam rayuan ini (lihat perenggan 20).]
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Notes

For cases on road accident in general, see 12(2) *Mallal's Digest* (5th Ed, 2015) paras 2294–2298.

Cases referred to

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517; [1996] 3 CLJ 163, FC (refd)

Goh Beng Seng v Dol bin Dolah [1970] 2 MLJ 95b (refd)

Low Kean Giap & Ors v Shaik Alawdeen all Shgaik Dawood & Anor [1999] MLJU 377; [1999] 7 CLJ 44, HC (refd)

Saad bin Junus v Amirul Haris bin Ideris [2013] 2 PIR (76) (refd)

Yeo Kim Kuan v Hamid [1968] 2 MLJ 188, FC (not folld)

Baljeet Kaur (VT Singam D Gunasegaran & Co) for the appellants.

Ayleswary Bathamanathan (Sudesh Narinder & Partners) for the respondent.

Mohamed Zaini Mazlan JC:**INTRODUCTION**

[1] The appellants, who were the defendants in the sessions court suit, had appealed against the decision of the sessions court, on the issue of liability and quantum. The sessions court held the respondent 10% liable and the appellants 90% liable.

[2] I shall refer the parties in their respective capacity in the sessions court.

BRIEF FACTS

[3] The claim arose out of a collision between two motorcycles rode by the plaintiff and the second defendant respectively at around 7am on the 5 July 2013. The second defendant died on the spot. The plaintiff however passed away about two years later on the 21 February 2015. The plaintiff was subsequently represented by his wife, and the second defendant by his father, in a representative capacity. The first defendant was the owner of the motorcycle that the late second defendant rode with permission.

[4] There were no eyewitness to the collision between the plaintiff and the second defendant. Although the plaintiff was still alive after the accident, he became bedridden, unconscious and unresponsive. In any event, he had passed away about three months before the trial commenced. Only two witnesses testified during the trial; the investigating officer ('SP1') and the late plaintiff's wife ('SP2').

[5] The learned sessions court judge ('SCJ') therefore only had the testimonies of SP1, SP2, the sketch plan and the photographs of the motorcycles and the road where the collision occurred.

A FINDINGS

On liability

B [6] The sketch plan indicated that the plaintiff travelled from the top to the bottom and the second defendant from the bottom to the top. The direction of travel was disputed by the defendant's counsel. It was submitted that there was no direct evidence to prove that the second defendant and the plaintiff were travelling in the opposite direction. It was also submitted that SP1 had concluded the plaintiff's direction based on a hearsay evidence, namely that of C SP2.

D [7] SP2 testified that the plaintiff was the IPD Tanjung Piandang's Chief Police. The plaintiff and her lived in the IPD Kerian then. According to SP2, the plaintiff would travel to work from their home in IPD Kerian towards IPD Tanjung Piandang in the direction indicated in the sketch plan, namely from top to bottom.

E [8] The learned SCJ agreed with SP1's finding that the plaintiff had travelled from top to bottom, based on what SP2 testified. The learned SCJ held that SP2's testimony was not hearsay, as her evidence was based on the plaintiff's route to work.

F [9] The learned SCJ also relied on the photographs showing the damage caused to the two motorcycles. He opined that it was a head on collision based on the extensive damage to the front of both motorcycles.

G [10] The learned SCJ then concluded that it was more likely that the second defendant had encroached onto the plaintiff's lane based on the photographs taken. It was not disputed that the motorcycles were not moved when the photographs were taken. The learned SCJ noted that the second defendant's motorcycle was positioned on the plaintiff's lane near the middle of the road, and concluded that it was the second defendant that had encroached into the H plaintiff's lane.

I [11] The learned SCJ however held that the plaintiff was partly to blame, based on the fact that his motorcycle was near the middle lane. He opined that the plaintiff should have travelled more to the side and not towards the middle. He also made this conclusion based on the damage caused to the motorcycles.

[12] Although a court hearing an appeal should be slow in interfering with the finding of facts reached by the trial court, a distinction is made where the finding of facts was based on inferences drawn from other facts, as opposed to

a finding based on the credibility of witnesses. It has been held by the Federal Court that an appellate court should be able to interfere more readily when it was the latter; *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517; [1996] 3 CLJ 163.

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B

[13] Learned counsel for the appellants submitted that the learned SCJ fell into error when he relied on the hearsay evidence of SP1 and SP2, as neither one of them had witnessed the accident.

C

[14] I am of the view, that the learned SCJ correctly concluded the direction of travel of at least the plaintiff. Although SP1's conclusion was premised on the statement by SP2, the circumstances support the fact that the plaintiff travelled from the top to the bottom in the sketch plan. The accident occurred at around 7am. It was not disputed that the plaintiff was travelling to work. It was also not disputed that the plaintiff lived in IPD Kerian and worked in IPD Tanjung Piandang as the Head of the police station there. Given these facts, the direction of travel had to be from the top to the bottom, as that would be the direction from where the plaintiff lived to where he worked.

D

E

[15] The learned SCJ also did not only rely on SP1 and SP2's statements alone, as he had relied on the silent evidence, namely the sketch plan and the photographs. In my opinion, he correctly concluded that it was the second defendant who had encroached into the plaintiff's lane, as the fragments were scattered in the plaintiff's lane. The photographs tendered as exhs P3(a) and (m) in particular, clearly show that the second defendant's motorcycle was on the right side facing the opposite direction.

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[16] It is perfectly permissible for the learned SCJ to have made his finding based on the silent evidence, as the court had since time immemorial placed great emphasis on the sketch plans and keys to draw the correct inferences and arriving at a conclusion; *Low Kean Giap & Ors v Shaik Alawdeen a/l Shgaik Dawood & Anor* [1999] MLJU 377; [1999] 7 CLJ 44.

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[17] I am also in agreement with the learned SCJ's apportionment of 10% liability on the plaintiff, based on his finding that the plaintiff was partly negligent in travelling near the middle of the road and not more to the side. Sharma J in *Goh Beng Seng v Dol bin Dolah* [1970] 2 MLJ 95b held:

H

There can be no territorial or geometrical division of the road. The centre line remains a guide and a reminder only. One's duty is to ensure safety for oneself and for others. The attitude of mind that because the driver coming from the opposite direction is encroaching a few inches of my side of the road, I can treat him as a trespasser and proceed on my half of the road as if it was my exclusive domain and that I am totally immune from liability if I drive within the exact limits of that

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A ‘realm’ even though I know that an accident may thereby happen on my side of the road, is the attitude of an irresponsible and an irrational being. I owe a duty to others on the road just as others owe a duty to me.

[18] I therefore find no reason to disturb the findings on liability.

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On quantum

[19] I shall address the defendants appeal on the respective heads of award based on the submissions:

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(a) *traumatic brain injury (RM300,000)*

The defendants had proposed the sum of RM220,000 in the sessions court, and are maintaining the same figure in this appeal. It was submitted that the award of RM300,000 by the sessions court was excessive, particularly as the maximum award set out in the Revised Compendium of Personal Injury Awards is RM220,000.

D

I am disinclined to disturb the award, as the learned SCJ had referred to the awards given in recent cases and was guided by them. He also correctly pointed out that the Compendium is merely a guideline, and that he was not bound to adhere to the amount set out in it;

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(b) *closed mid-shaft fracture right femur (RM30,000) and closed right tibia plateau fracture (RM18,000)*

It was submitted that these two items should not have been awarded separately, and that it should be counted as one. I am in agreement with the learned SCJ's findings that the award should be separated as the injuries were in two separate parts;

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(c) *closed fracture mid-shaft right radius and ulna (RM20,000) and open comminute fracture distal end right radius and ulna (RM20,000)*

Similarly, it was also submitted that a global award should have been awarded and not distinctly. For the same reasons as the previous head, I am inclined to agree that a separate award should be given, as the learned SCJ correctly pointed out that the injuries were on separate parts of the right arm;

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H (d) *reduction of 35% from the total amount of RM416,000*

The defendants' counsel submitted that the learned SCJ should have reduced the general award by more than 35%, in view of the fact that the plaintiff had passed away 19 months after the accident, and cited the case of *Yeo Kim Kuan v Hamid* [1968] 2 MLJ 188 in support. In that case, the facts were similar and that the court had reduced the amount awarded from RM110,000 to RM13,383.75.

I

I am in agreement with the learned SCJ for refusing to follow the decision in *Yeo Kim Kuan*, which was decided way back in 1968. He had opted to closely follow a recent case in *Saad bin Junus v Amirul*

Haris bin Ideris [2013] 2 PIR (76), where the court had deducted 35% of the amount awarded. In my view, the learned SCJ was very much entitled to exercise his discretion on the percentage to be deducted;

A

(e) *loss of dependency*

Against the sum of RM100,800 awarded by the sessions court, the defendants proposed the sum of RM93,600. I am of the view that the difference between the amount awarded and the amount proposed are not significant. This suggests that the amount awarded by the learned SCJ was not entirely excessive; and

B

C

(f) *nursing care*

Against the award of RM19,000 on the basis of RM1,000 for 19 months, the defendants submitted the sum of RM7,600 based on RM400 per month for nineteen months. It was submitted that the learned SCJ fell into error when he took into consideration the costs of buying diapers, milk, medicine and so on, as these items had already been awarded separately.

D

Having considered the submissions again, I must admit that I should have reduced the amount as sought by the defendants, as it is correct that the learned SCJ had already made a separate award for those items.

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[20] It has been well stated in decided cases, that the appellate court should be slow in reversing the amount of damages awarded by the trial judge, unless the trial judge had acted on a wrong principle of law or fact, or had grossly overestimated or underestimated the amount awarded. I find no evidence of that in this appeal.

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[21] I had based on the grounds set out, dismissed the defendant's appeal with costs of RM3,000.

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Appeal dismissed with costs of RM3,000.

Reported by Dzulkarnain Ab Fatar

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